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THE CORRESPONDENT ADULTERY STATUTE IN A CONFLICT OF LAWS SETTING

By WALTER A. RAFALKO†

"This statute is not against public policy, but accords therewith, and tends to assure a decent propagation of the human race; and, where the husband from whom the divorce is obtained, on account of his adultery, marries the woman with whom it was committed, during the lifetime of the first wife, such marriage is void. . . ."

Turney, J., in *Owen v. Brackett*,
75 Tenn. 444, 449 (1881).

I.

INTRODUCTION

BASICALLY, we are a religious people.¹ As the quoted passage intimates, the institution of marriage should be perpetual. It reflects a divine precept of the Christian religion, promotes the best interests of human happiness in the temporal order, fulfills the design of the marital contract and achieves the objective of the parties entering into the marital state. Obviously, the purpose of any statute prohibiting adultery is to preserve the sanctity of the marriage and, ultimately, of society itself.

At the intrastate or domestic level, no problem arises. In the states which have passed correspondent adultery statutes, the courts have recognized that it is competent for the legislature of any state, in furtherance of its public policy, to impose a disability upon its citizens restricting their right to contract marriages with their paramours.²

However, at the interstate³ or foreign⁴ level, the decisions are in conflict. Some courts feel that a statute banning marriage with an adulterer applies only to residents of the state divorced by a decree of the state of rendition and not to non-residents who are permitted to remarry the correspondent,⁵ while other courts, under such a statute,

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1. In *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), Mr. Justice Douglas said: "We are a religious people whose institutions presuppose a Supreme Being."

2. *Connor v. Connor*, 6 Lac. Jur. 43 (1905).

3. *In re Donlay's Estate*, 280 App. Div. 37, 111 N.Y.S.2d 253 (1952).

4. *Petition of Mayall*, 154 F. Supp. 556 (E.D. Pa. 1957).

5. *Supra* note 3.

hold that a party divorced on the ground of adultery is under a personal incapacity to marry the corespondent during the lifetime of the former spouse and is incapable of marrying in a state which has an adultery statute prohibiting such remarriages.⁶

This article attempts to examine the corespondent adultery statute and some of the problems that might arise in a Conflict of Laws case when a modern-day "woodchuck" marries his corespondent in another state prohibiting such remarriages. While this action may be shocking and reprehensible in our civilized society, it occurs more frequently than one anticipates.

The term "Conflict of Laws" would include any case in which the facts, occurrences or events have transpired in a state or country and suit is brought in another, so that the domestic forum must choose between the forum's law and the law of the place where the facts, occurrences or events have happened before the domestic forum can determine the substantive rights between the parties.⁷

The problem becomes very acute, especially when Wife No. 2 (*W-2*) applies for citizenship, letters of administration, a distributive share of the estate, veteran's and social security benefits, or to establish the legitimacy of the children born of the marriage.⁸ For this reason, the Conflict of Laws aspect of this problem demands further study.

II.

THE CORESPONDENT ADULTERY STATUTE

The first state to pass a corespondent adultery statute was Pennsylvania on March 13, 1815. Section IX of the Pennsylvania Act of 1815 provides:

That the husband or wife, who shall have been guilty of the crime of adultery, shall not marry the person with whom the said crime was committed during the life of the former wife or husband: but nothing herein contained shall be construed to extend to or affect or render illegitimate any children born of the body of the wife during coverture.⁹

6. *Supra* note 4.

7. LEFLAR, *THE LAW OF CONFLICT OF LAWS* 1 (1959); *RESTATEMENT, CONFLICT OF LAWS*, § 1 (1934).

8. *Garcia v. Aguayo*, 39 P.R.R. 82, *affirmed, sub nom. Casals v. Fernandez*, 40 F.2d 831 (1st Cir. 1930).

9. Act of March 13, 1850, P.L. 153, 6 Sm. L. 286, § 9; PA. STAT. ANN. tit. 48, § 169 (1930).

There are only two other states, Tennessee and Louisiana, which have provisions basically identical with that of Section IX of the Pennsylvania Act of 1815. Section 8452 of the Tennessee Code of 1938 provides:

When a marriage is absolutely annulled, or dissolved, the parties shall severally be at liberty to marry again; but a defendant who has been guilty of adultery shall not marry the person with whom the crime or act was committed, during the life of the former husband or wife.¹⁰

Article 161 of the Louisiana Civil Code of 1932 states:

In case of divorce, on account of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy, and under the penalty of nullity of the new marriage; provided, however, that marriages contracted in this or any other state prior to December 31, 1962 in contravention of this article but which are not invalid under any other laws of this state shall be deemed valid.¹¹

Other states have statutes which permit the guilty party, under certain circumstances, such as after three years have elapsed, to marry the paramour.¹² They do not perpetually enjoin the guilty party from remarrying the correspondent. In Virginia, a court has the power to decree that the guilty party shall not remarry the paramour, but such a decree may be revoked at any time after the expiration of a six-month period.¹³ Even the Territory of Puerto Rico imposes

10. TENN. CODE ANN. tit. 36, § 831 (1955).

11. LA. CIV. CODE ANN. art. 161 (1952).

12. Chapter 14, Section 8, DOMESTIC RELATIONS LAW, McKinney's Consolidated Laws of New York provides:

Whenever a marriage has been or shall be dissolved, the complainant may marry again during the lifetime of the defendant. But a defendant for whose adultery the judgment of divorce has been granted in this state may not marry again during the lifetime of the complainant, unless the court in which the judgment of divorce was rendered shall in that respect modify such judgment, which modification shall be made only upon satisfactory proof that three years have elapsed since the decree of divorce was rendered, and that the conduct of the defendant since the dissolution of said marriage has been uniformly good; and a defendant for whose adultery the judgment of divorce has been rendered in another state or country may not marry again in this state during the lifetime of the complainant unless three years have elapsed since the rendition of such judgment and there is no legal impediment, by reason of such judgment, to such marriage in the state or country where the judgment was rendered. But this section shall not prevent the remarriage of the parties to an action for divorce.

13. Section 20-119 of the 1950 Virginia Code provides:

In granting a divorce for adultery, the court may decree that the guilty party shall not marry again at any time; in which case, the bond of matrimony shall be deemed not to be dissolved as to any future marriage of such party, or in any prosecution on account thereof. But, for good cause shown, so much of any

a five-year disability to contract marriage by the adulterous parties, if this is the court's decree.¹⁴ In the remaining states and territories, there are no express pronouncements on this issue.

III.

DOMESTIC MARRIAGE OF ADULTERERS

This first situation presents little difficulty to the courts. In this hypothetical situation, both *H* and *W* reside in the same state. *H* is divorced from *W* on the ground of adultery with *C*. Shortly after the divorce, *W* and *C* are married in the same state. *C* dies and *W* claims a distributive share of *C*'s estate or other benefits. In *Warrenberger v. Folsom*,¹⁵ an action by *W* claiming mother's insurance benefits for *W* and child's insurance benefits for the child under the Social Security Act, it was held this statute imposes a personal incapacity to marry in any circumstances or at any time or in any place as long as the injured party is living, and the prohibition of the statute is not limited to ceremonial marriages alone but includes those contracted in common law form and recognized by Pennsylvania. Thus, *W* was not married legally to *H-2* and was not his widow so as to be entitled to mother's insurance benefits under the Social Security Act, nor was her child born after *W*'s divorce from *H-1* entitled to child's benefits under Pennsylvania law.

The prevailing view is that no legal rights can grow out of a void marriage if contracted by adulterers during the divorced spouse's lifetime.¹⁶

However, in some instances the courts, while holding the marriage of the adulterers invalid and the subsequent relationship meretricious, recognize the civil effects of the marriage.¹⁷ In *Kimball v. Folsom*,¹⁸ another social security benefit case, the court held that *W* had acted in "good faith," was deemed to be a putative wife and entitled to the civil effects of the marriage.

decree as prohibits the guilty party from marrying again, may be revoked and annulled, at any time after the expiration of six months from the date of such decree, by the same court by which it was pronounced.

14. Title 31, section 233(5) of the 1954 Civil Code of Puerto Rico provides: "Nor can the following contract marriage with each other: 5. The parties to an adultery who have been convicted by a final judgment for five years after such judgment."

15. 239 F.2d 846 (3d Cir. 1956).

16. *Bennett v. Anderson*, 20 Tenn. App. 523, 101 S.W.2d 148 (1936); *Jennings v. Jennings*, 165 Tenn. 295, 54 S.W.2d 961 (1932).

17. *Lembcke v. U.S.*, 181 F.2d 703 (2d Cir. 1950); *Petition of Mayall*, 154 F. Supp. 556 (E.D. Pa. 1957); *Succession of Pigg*, 228 La. 799, 84 So. 2d 196 (1955); *Succession of Marinoni*, 183 La. 776, 164 So. 797 (1936); *Chandler v. Hayden*, 159 La. 5, 105 So. 80 (1925); *Jones v. Squire*, 137 La. 883, 69 So. 733 (1915).

18. 150 F. Supp. 482 (W.D. La. 1957).

IV.

FOREIGN MARRIAGE OF ADULTERERS

In the second hypothetical situation, both *H* and *W* reside in the same state. *H* is divorced from *W* on the ground of adultery with *C*. Shortly after the divorce, *W* and *C* are married in another state where such marriages are not prohibited, solely for the purpose of evading the local law, and return to the state of their domicile. *C* dies and *W* claims some interest arising from the second marriage.

Much has been written on this aspect of the problem and the law is apparently well settled.¹⁹ This is especially true if some version of the old "Uniform Marriage Evasion Act" has been adopted. This Act had been adopted in five states.²⁰ This Uniform Act prohibited any person residing in the state, who was prohibited from contracting marriage within the state, from going into another state or country and there contracting a marriage prohibited by the laws of the domiciliary state. If he did evade the laws of the domiciliary state, then such marriage would be null and void for all purposes within the domiciliary state. The District of Columbia,²¹ Indiana,²² Maine,²³ Mississippi,²⁴ North Dakota,²⁵ Virginia²⁶ and West Virginia²⁷ adopted similar marriage evasion statutes. However, in 1943, the Commissioners on Uniform State Laws withdrew this Act, along with several others, stating it tended to produce confusion in the law because only a few states had passed it.

In *Maurer v. Maurer*,²⁸ a libel for annulment of marriage, *H* was divorced by *W*-1 in Pennsylvania on the ground of adultery with *C*. *H* and *C*, the correspondent in the adultery charge, thereafter went

19. 27A C.J.S. *Divorce*, § 162 (1959); *Legislative Symposium: The 1958 Regular Session*, 19 LA. L. REV. 52, 53 (1958); *Louisiana Legislation of 1962: A Symposium*, 23 LA. L. REV. 41 (1962); Comment, *Louisiana Law on the Nullity of Marriage*, 20 LA. L. REV. 563, 574 (1960); Note, *Foreign Marriages in Evasion of Local Statutes*, 17 TENN. L. REV. 378, 389 (1942); Note, *Domestic Relations — Putative Marriage — Article 161, Louisiana Civil Code of 1870*, 32 TUL. L. REV. 130 (1957).

20. ILL. REV. STAT. ANN., ch. 89, §§ 19-24 (1955); LA. REV. STAT. ANN., §§ 9:221-9:224 (1950); MASS. ANN. LAWS, ch. 207, §§ 10-13, 50 (1955); VT. REV. STAT., §§ 3154-55 (1947); WIS. STAT., § 245.04 (1951).

21. D.C. CODE ANN., § 30-105 (1951).

22. IND. ANN. STAT., § 44-209 (Burns, 1952).

23. ME. REV. STAT. ANN., ch. 166, § 9 (1954).

24. MISS. CODE ANN., § 459 (1942).

25. N. DAK. REV. CODE, § 14-0308 (1943).

26. VA. CODE ANN., §§ 20-40, 20-44, 20-58 (1950).

27. W. VA. CODE ANN., § 4695 (1955).

28. 163 Pa. Super. 264, 60 A.2d 440 (1948). See *Stull's Estate*, 183 Pa. 625, 39 Atl. 16 (1898); *Kline v. Kline*, 43 York 114 (1929); *Immendorf's Estate*, 12 York 90, *aff'd on another point*, 190 Pa. 590, 42 Atl. 959 (1899).

to Maryland and married. Following the marriage, they *immediately* returned to Pennsylvania where they lived together for nine years. *H* then sued in Pennsylvania for annulment on the ground that the marriage in Maryland was void under the Pennsylvania correspondent adultery statute. The Pennsylvania court held that the Maryland marriage was void and the annulment action proper.

In *Penneger v. State*,²⁹ a prosecution for lewdness, *H* was divorced from *W* on the ground of adultery with *C* in Tennessee. Shortly after the divorce, *W* and *C* went to Alabama and were married, returning the very next day to Tennessee. The Tennessee court upheld the conviction, stating that the marriage was void in Tennessee, although valid in Alabama, and was contrary to the public policy of Tennessee.

In *Rhodes v. Miller*,³⁰ a suit for annulment of a marriage, *H* was married in Louisiana where *H* and *W* had resided. *W* sued for and obtained a judgment for divorce on the ground of adultery with *C*. *H* and *C* were married in Illinois for the purpose of evading the correspondent adultery statute. Immediately after their marriage, they returned to Louisiana. Later, *H* sought a judgment decreeing his marriage with *C* to be null and void. The Louisiana court held that a marriage contracted in violation of the prohibitory statute contravenes the policy of the law, is an absolute nullity, and is open to attack as such.

That this is the Pennsylvania law in this situation appears to be settled by the case of *Stull's Estate*,³¹ a denial of an application for letters of administration, wherein the Supreme Court of Pennsylvania stated:

(1) That the foreign marriage is contrary to the positive statute of the domicile; (2) that it is contrary to the public policy of the government of the domicile, in that it offends against the prevailing sense of good morals among the people there dwelling; and (3) it was contracted for the express purpose of evading positive law of the domicile, and it is therefore to be regarded as a fraud upon the government and people of the domiciliary residence. The combination of these three objections seems to be most fatal to the validity of the marriage thus contracted.³²

29. 87 Tenn. 244, 10 S.W. 305 (1889). See *State v. Bell*, 66 Tenn. 9 (1872); *Carter v. Montgomery*, 2 Cooper's Tenn. Ch. 216 (1875).

30. 189 La. 288, 179 So. 430 (1938). See *Succession of Knupfer*, 174 La. 1048, 142 So. 609 (1932); *Succession of Gabisso*, 119 La. 704, 44 So. 438 (1907); *Succession of Hernandez*, 46 La. Ann. 962, 15 So. 461 (1894).

31. 183 Pa. 625, 39 Atl. 16 (1898).

32. *Id.* at 632-33, 39 Atl. at 18.

V.

FOREIGN LAW INHIBITING REMARRIAGE

Assume in the third hypothetical situation that both *H* and *W* reside in another state. *H* divorces *W* on the grounds of desertion. Shortly thereafter, *W* marries *C* in the other state. The law of the sister state provides that the offending party shall not be released from the marriage contract but, if the offending party remarries, he or she shall be subject to all the pains and penalties of bigamy. In *Dickson v. Dickson*,³³ a petition for dower of the real estate of *C* whom *W* married in Tennessee, the court held that the law of Kentucky, providing that the offending party shall not remarry after the other party has obtained an absolute divorce, is of no force and effect in Tennessee, where such marriages *are not prohibited*. No principle of comity requires Tennessee to give force and effect to the penal laws of Kentucky. Penal laws can have no extra-territorial effect and *W* was lawfully married to *C* in Tennessee and is entitled to dower. However, what if the marriage *is prohibited* by the state of the new domicile of *W* and *C*? In *Wagner v. Wagner*,³⁴ a libel for annulment of a bigamous marriage by *C* against *W*, the court held that where the states of New York and Pennsylvania have similar statutory prohibitions imposing upon an adulteress, *W*, a personal disability from marrying the correspondent, *C*, during the lifetime of the libellant, *H*, and where a divorce decree is entered against the New York respondent, *W*, on grounds of adultery, the Commonwealth of Pennsylvania will give full faith and credit to the New York decree and will refuse to declare legal a purported common law marriage entered into in Pennsylvania between the respondent, *W*, and correspondent, *C*, and the decree of annulment was granted.

Suppose *W* resided in and was married to *C* in another state or foreign country, which had *no* paramour statute. Would Pennsylvania, Louisiana or Tennessee recognize the validity of such a marriage if *W* and *C* subsequently moved to any one of these three states? On the basis of comity and the Full Faith and Credit Clause of the Constitution of the United States,³⁵ it would appear that such a marriage would be valid. The general rule is that a marriage valid

33. 9 Tenn. 110 (1826).

34. 58 Montg. 18, *aff'd*, 152 Pa. Super. 4, 30 A.2d 659 (1942).

35. U.S. CONSTITUTION, Art. IV, § 1, provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

where solemnized is valid everywhere.³⁶ California,³⁷ Idaho,³⁸ Kansas,³⁹ Kentucky,⁴⁰ Nebraska,⁴¹ New Mexico,⁴² North Dakota,⁴³ South Dakota,⁴⁴ and Utah⁴⁵ expressly declare by statute that a marriage valid where contracted is valid everywhere. To this rule there is an exception: "unless contrary to the prohibitions of natural law or the express prohibitions of a statute."⁴⁶ There are more specific grounds for declaring marriages void by the state of domicile spelled out in the Restatement.⁴⁷

Thus, in *In Re Mayall's Naturalization*,⁴⁸ a petition for naturalization, the court stated:

Thus, if at the time petitioner [wife] was married in Pennsylvania, she resided in and was married in any territory or state of the United States other than Pennsylvania, Louisiana or Tennessee, such a marriage would have been valid and recognized as such in every other territory or state, including the last named States, and here moral character would never have been questioned by the Naturalization Service on the ground that she married and lived with her correspondent.

VI.

DOMESTIC LAW INHIBITING REMARRIAGE

The fourth hypothetical situation presents the greatest difficulty and there are no decisions by the highest state courts on this subject matter. There are, however, some lower court decisions which hold the paramour prohibition statute applicable.⁴⁹ Assume in the fourth hypothetical situation that both *H* and *W* reside in another state. *H* divorces *W* on the grounds of adultery. Shortly thereafter, *W* marries *C* in the other state. This other state has a statute which imposes an absolute personal incapacity on the guilty party to a divorce suit for adultery to remarry the correspondent during the life-

36. RESTATEMENT, CONFLICT OF LAWS, § 121 (1934).

37. CAL. CIV. CODE ANN., § 63 (1954).

38. IDAHO CODE ANN., § 32-209 (1947).

39. KAN. GEN. STAT. ANN., § 23-115 (1949).

40. KY. REV. STAT. ANN., § 402.040 (Baldwin, 1955).

41. NEB. REV. STAT., § 42-117 (1952).

42. N.M. STAT. ANN., § 57-1-4 (1953).

43. N.D. CODE ANN., § 14-0308 (1959).

44. S.D. CODE, § 14.0103 (1939).

45. UTAH CODE ANN., § 30-1-4 (1953).

46. *Thorp v. Thorp*, 90 N.Y. 602, 605 (1882).

47. RESTATEMENT, CONFLICT OF LAWS, §§ 131-32 (1934).

48. 154 F. Supp. 556, 561 (E.D. Pa. 1957).

49. *Id.* at 559.

time of the person who obtained the divorce. The issue arises as to whether or not this is a valid marriage between *W* and *C*.

The cases are in conflict on this point. One school of thought holds that the paramour statute is inapplicable when the remarriage takes place in Pennsylvania, Louisiana or Tennessee.⁵⁰ In *In Re Donlay's Estate*,⁵¹ a proceeding to vacate and set aside a Surrogate Court decree granting letters of administration to *W*, the Surrogate denied the motion of *W* to dismiss the petition, and *W* appealed. The Appellate Division of the Supreme Court held that *W* was *H*'s widow to whom letters of administration could be issued. In this case *H*, divorced by a decree in New York, went to Pennsylvania and married *W*, the correspondent, and then returned to New York and continued to reside there until his death. The New York court held the Pennsylvania statute prohibiting marriage of adulterer and paramour was inapplicable because the Pennsylvania statute applies only to residents of Pennsylvania divorced for adultery by decree of a Pennsylvania court.

In *Nichols v. Buffalo Weaving and Belting Co.*,⁵² a disability compensation and death benefit claim under the New York Workmen's Compensation Law, *W*, the claimant, married an employee, *C*, in Pennsylvania in violation of the New York divorce decree which prohibited her marriage within the lifetime of her husband, *H*. The court held that *W* was the legal widow of *C* and could recover death benefits under the compensation law. The court stated the Pennsylvania statute was inapplicable in this case. There was no proof that *W* was ever convicted of the crime of adultery and the finding of adultery by a court in a private civil action is not a substitute for a judgment of conviction. In addition, there was no competent proof in the record that *C* was the correspondent named in the divorce suit.

The one definite proposition of law which emerged from the case of *In re Palmer's Estate*,⁵³ is that the Pennsylvania statute which prohibits a defendant who has been divorced on the grounds of adultery from contracting a marriage with the correspondent will apply only to a case in which the name or identity of the correspondent appears in the findings, judgment, or the evidence of the divorce proceedings.

50. *Lembcke v. United States*, 181 F.2d 703 (2d Cir. 1950); *In re Donlay's Estate*, 280 App. Div. 37, 111 N.Y.S.2d 253 (1952); *In re Palmer's Estate*, 275 App. Div. 792, 90 N.Y.S.2d 179 (1949); *Nichols v. Buffalo Weaving & Belting Co.*, 276 App. Div. 228, 94 N.Y.S.2d 294 (1949); *Fisher v. Fisher*, 250 N.Y. 313, 165 N.E. 460 (1929); *Thorp v. Thorp*, 90 N.Y. 602 (1882).

51. 280 App. Div. 37, 111 N.Y.S.2d 253 (1952).

52. 276 App. Div. 294, 94 N.Y.S.2d 294 (1949).

53. 275 App. Div. 792, 90 N.Y.S.2d 179 (1949); *In re Donlay's Estate*, 106 N.Y.S.2d 603 (1951), *rev'd on other grounds*, 280 App. Div. 37, 111 N.Y.S.2d 253 (1952).

The Pennsylvania statute does not prohibit a marriage to a person other than the paramour. The Pennsylvania court stated in *In re Beegle's Estate*⁵⁴ that the Pennsylvania statute which forbids a woman who has been divorced on the ground of adultery to remarry during the life of the husband will not apply to a case where a woman marries again but the record of the divorce proceedings shows no adulterous conduct with the second husband prior to the divorce, although such conduct is alleged in proceedings over the distribution of the second husband's estate.

The Tennessee version of the statute was interpreted in *Cole v. Parton*,⁵⁵ a bill to have a later marriage declared void, where *H* was divorced by *W-1* on the grounds of desertion and remarried and lived with *W-2* until his death thirty-one years later. The court held that the children of the first marriage could not attack the validity of the second marriage on the grounds that *H* lived in adultery with *W-2* prior to being divorced by *W-1* because *H* was divorced on the grounds of desertion and not adultery.

The Louisiana statute was interpreted in *Jones v. Floyd*,⁵⁶ a suit for divorce, in which the court stated that the law does not contemplate that a spouse at fault in the dissolution of one marriage should be forever denied the privilege of entering into another, since a wife has no legally recognized interest to defeat her husband's right to remarry following divorce to which he is entitled by law upon a ground other than adultery. This article prohibiting divorced persons from marrying the accomplice in adultery under penalty of nullity of new marriage applies only where the identity of the accomplice appears in the record or in the evidence.

In *Garcia v. Aguayo*,⁵⁷ the court pointed out that, for the annulment of a canonical marriage contracted prior to the enactment of the Spanish Civil Code because of the previous adultery of those who contracted the marriage later, it is a condition precedent that the adulterers had been convicted by final judgment, and, without such judicial declaration and penal sanction, there was no incapacity.

The second school of thought holds that the paramour or accomplice statute is applicable when the marriage takes place in a pro-

54. 64 Pa. Super. 180 (1916).

55. 172 Tenn. 8, 108 S.W.2d 884 (1937); *Plantt v. Plantt*, 28 Tenn. App. 79, 186 S.W.2d 338 (1944).

56. 154 So. 2d 604 (La. App. 1963); *Rhodes v. Miller*, 189 La. 288, 179 So. 430 (1938); *Succession of Knupfer*, 174 La. 1048, 142 So. 609 (1932); *Succession of Gabisso*, 119 La. 704, 44 So. 438 (1907); *Succession of Hernandez*, 46 La. Ann. 962, 15 So. 461 (1894).

57. 39 P.R.R. 82 (1929), *aff'd sub nom.* *Casals v. Fernandez*, 40 F.2d 831 (1st Cir. 1930).

hibited state and the marriage is invalid.⁵⁸ In *In re Mayall*,⁵⁹ a naturalization proceeding, the federal court, following the *Erie* doctrine, held that the evidence established the good moral character of the petitioner, *W*, during the five-year period preceding the filing of her petition, even though under Pennsylvania law her marriage to *C*, the man named as the correspondent in the British divorce decree on the grounds of adultery, in that state during the lifetime of her former husband would be invalid and the subsequent marital relationship meretricious. The reason for so holding was that in most of the other states such a marriage would have been valid.

In *Allen v. Allen*,⁶⁰ a divorce action, the court used strong language to point out that the prohibition of the statute declaring that the spouse guilty of adultery cannot marry the correspondent is not merely rhetoric; it imposes a personal incapacity on a respondent to marry the person with whom the adultery was committed.

Kalmbacher v. Kalmbacher,⁶¹ an annulment proceeding, holds that under the Pennsylvania statute a marriage between a husband and his correspondent in a former divorce action in which a divorce decree was granted by a New York court, where both parties resided, on the ground of adultery, is forbidden and such a marriage in Pennsylvania is null and void and will be so declared by the Pennsylvania courts even though neither party was a resident of Pennsylvania.

Young v. Young,⁶² a libel for divorce, indicates that every libellant, in a divorce action based on adultery, owes a high duty to the Commonwealth. Wherever possible a correspondent should be named and he or she and the respondent should be prohibited from marrying each other during the lifetime of the libellant.

The above cases should be compared with *Schofield v. Schofield* (No. 1),⁶³ a divorce proceeding, where a marriage between first cousins is not unlawful in Delaware, but is unlawful in Pennsylvania. This Delaware marriage was held to be valid in Pennsylvania and not incestuous, even though such a marriage celebration or ceremony is not permitted in Pennsylvania. It was held that this statute was not

58. *Petition of Mayall*, 154 F. Supp. 556 (E.D. Pa. 1957); *Rhodes v. Miller*, 189 La. 288, 179 So. 430 (1938); *Succession of Knpfer*, 172 La. 1048, 142 So. 609 (1912); *Succession of Gabisso*, 119 La. 704, 44 So. 438 (1907); *Succession of Hernandez*, 46 La. Ann. 962, 15 So. 461 (1894); *In re Stull's Estate*, 183 Pa. 625, 39 Atl. 16 (1898); *Allen v. Allen*, 165 Pa. Super. 379, 67 A.2d 629, 68 A.2d 465 (1949); *Maurer v. Maurer*, 163 Pa. Super. 264, 60 A.2d 440 (1948); *Schofield v. Schofield* (No. 1), 51 Pa. Super. 564 (1912); *Kalmbacher v. Kalmbacher*, 63 Pa. D.&C. 195 (C.P. Susquehanna County 1949); *Young v. Young*, 29 Erie 265 (1946); *Penneger v. State*, 87 Tenn. 244, 10 S.W. 305 (1889); *State v. Bell*, 66 Tenn. 9 (1872); *Carter v. Montgomery*, 2 Cooper's Tenn. Ch. 216 (1872).

59. 154 F. Supp. 556 (E.D. Pa. 1957).

60. 165 Pa. Super. 379, 67 A.2d 629, 68 A.2d 465 (1949).

61. 63 Pa. D.&C. 195 (C.P. Susquehanna County 1949).

62. 29 Erie 265 (1947).

63. 51 Pa. Super. 564 (1912).

intended to apply extra-territorially and is not against the strong public policy, as the adultery statute is, in Pennsylvania, and forbids the marriage relation to be contracted. The incest statute does not make the marriage relation, the status of marriage, between first cousins unlawful. It prohibits only the celebration of the marriage, that is, the making of a marriage contract, in Pennsylvania, but not in any other state.

Would dire results follow if the courts struck down as void a marriage between the guilty party and his or her paramour? What effect would this have on the legitimacy status of the children born of a void or voidable marriage in one of these states prohibiting such marriages? The effect would not necessarily be deleterious — the only ones that will be affected are the guilty spouses and not children born of such a marriage. The Louisiana statute provides:

Art. 158. *Rights of children of the marriage.*

Art. 158. This separation or divorce shall not in any case deprive the children born of the marriage of any of the advantages which were secured to them by law, or by the marriage contract of their father and mother; but there is no right to any claim on the part of such children, except in the manner and under the circumstances where such claims would have taken place, if there had been no separation.⁶⁴

The Pennsylvania statute states:

§ 169.1 *Void or voidable marriages; children; legitimacy.*

In all cases where a supposed or alleged marriage is contracted, which is absolutely void by reason of one of the parties thereto having a spouse living at the time of the supposed or alleged marriage, or if for any other lawful reason the said marriage was void or voidable when contracted, all children born of such parties shall be deemed the legitimate children of both parties for all purposes.⁶⁵

The Tennessee statute declares:

36-832 *Legitimacy of children.* — The annulment or dissolution of the marriage shall not in any wise affect the legitimacy of the children of the same.⁶⁶

The language of the Louisiana and Tennessee statutes is very similar in providing that the legitimacy of children shall not be

64. LA. CIV. CODE ANN. art. 158 (West, 1952).

65. PA. STAT. ANN. tit. 48, § 169.1 (1964).

66. TENN. CODE ANN., § 36-832 (1955).

affected by annulment or dissolution of the marriage. However, this statute is not limited in its application to cases where there is an annulment or divorce by decree of court, but applies equally to those cases where parents do not seek such relief, since the statute was enacted for the benefit of the children of a marriage annulled or dissolved and to protect them as the innocent persons involved.⁶⁷ The court of Tennessee indicated in *Taliaferro v. Rogers*,⁶⁸ a suit to assert title to real property, that the statute providing that annulment or dissolution of a marriage shall not affect the legitimacy of children affords protection to the children and thus is designed to protect the issue of marriages which are void *ab initio*.

Since conflicting views exist concerning the status of a marriage between the paramour and the accomplice in the situation involving non-residents, the better view must be determined. The overwhelming number of cases appears to favor the declaration of such marriages between the respondent and correspondent as null and void.⁶⁹ The rationale for this position is grounded in public policy. Fundamentally, it was designed to prevent collusive and feigned divorces to evade the purposes of the divorce law. Since a divorce on the grounds of adultery may be readily obtained in any one of these states, it would be a simple thing for the wrongdoing spouse to commit adultery to evade the statutory prohibition. This prohibition against the marriage of the paramour and the accomplice in an adultery situation serves as a deterrent to those who would simulate an act of adultery for the sole purpose of expediting a divorce *a vinculo matrimonii*. Indeed, even if the act of adultery is not fabricated, the paramour statute serves as a bulwark supporting the determined public policy of the state not to give legal sanction to what is at best a meretricious relationship between the evildoers.⁷⁰

As the federal court pointed out in the case of *In re Mayall*:

. . . , we earnestly believe that a Pennsylvania court of state-wide jurisdiction would hold that the personal incapacity to marry imposed by § 9 is applicable to all guilty parties marrying the correspondent within the confines of Pennsylvania regardless of where the divorce was obtained.⁷¹

67. *Diehl v. Jones*, 170 Tenn. 217, 94 S.W.2d 47 (1936); *Taliaferro v. Rogers*, 35 Tenn. App. 521, 248 S.W.2d 835 (1951); *Duggan v. Ogle*, 25 Tenn. App. 467, 159 S.W.2d 834 (1941). Cf. *Maunier v. Coutejean*, 45 La. Ann. 419, 12 So. 623 (1893). See 7 AM. JUR. *Bastards*, § 7 (1937); Annot.: 84 A.L.R. 499 (1933); 10 C.J.S. *Bastards*, § 2C (1938).

68. 35 Tenn. App. 521, 248 S.W.2d 835 (1951).

69. *Supra* note 58.

70. *Young v. Young*, 29 Erie 265 (1946).

71. 154 F. Supp. 556, 560 (E.D. Pa. 1957).

VII.

CONCLUSION

There is no dispute that adultery is an indignity of the worst sort and, if it was not controlled by the legislature, civilly and criminally, it would destroy our society as it now exists. It is not surprising, therefore, that the state legislatures have made this act a ground for divorce and have prescribed a procedure permitting the dissolution of the marital bond to protect the injured spouse. Further, the legislatures have implemented the aforementioned divorce statute by preventing the one guilty of adultery from marrying his corespondent, paramour or accomplice.

While there exists some doubt as to the legislative intent that the statute should have an extra-territorial effect, the majority of the courts state that the act imposes a personal incapacity on the respondent to marry the person with whom the adultery was committed — whether they be residents or non-residents.

For this reason, the paramour should be clearly named in the libel, if possible, and the paramour named in the libel as corespondent should be given adequate notice of the charge, with the opportunity for a fair hearing to disprove the falsification, if possible. This would be a matter of record in the original divorce proceedings and would enable a party to marry a person other than the paramour.

To remove the ambiguity that presently exists in the statutes, the legislatures should spell out that the statute will have an extra-territorial effect in a Conflict of Laws case, and such marriage, within or without the state, will definitely be declared null and void. Unless this is done, the wrongdoers, the respondent and corespondent, run a serious risk when they marry in Louisiana, Pennsylvania and Tennessee.